Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1450

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FRANCIS STORY GOELTZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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IN THE

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October Term, 1974

No. _____

FRANCIS STORY GOELTZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

Petitioner prays that a Writ of Certiorari issue to review the Decision of the U. S. Court of Appeals, Tenth Circuit, entered March 21, 1975.

DECISION BELOW

The United States Court of Appeals, Tenth Circuit, affirmed the Judgement of the United States District Court for the District of Utah, Central Division, entering their Opinion and Judgement on March 21, 1975 (D.C. No. CR-24-73).

The Opinion in full is appended herein, Appendix A.

The District Court did not render an opinion.

## JURISDICTION

There exists an important question of Federal Law which has not been, but should be, settled by this court.

There has been a Federal question decided by the Court of Appeals in a manner which conflicts with applicable decisions of this court.

The Court of Appeals has so far sanctioned a departure by the Lower Court, as to call for an exercise of this court's power of supervision.

The United States Court of Appeals, Tenth Circuit, entered a judgement in this matter on March 21, 1975 (D.C. No. CR-24-73).

On April 15, 1975, Petitioner filed an Application for Extension of Time within which to file a petition for Writ of Certiorari with the United States Supreme Court. An order from the court No. A-885, dated April 18, 1975, extended the time for filing to May 20, 1975.

Jurisdiction of the United States Supreme Court is invoked under 28 U.S.C., Sec. 1254 (1).



## QUESTIONS PRESENTED

I. Does the application of 18 U.S.C., Section 701, to the conduct of Petitioner:

   A. Do violence to Petitioner's First Amendment rights to free speech and freedom of expression?

   B. Strain the law beyond the intent of the enacting legislative body?

   C. Require unreasonable alteration of the words INSIGNIA, IDENTIFICATION AND BADGE, either in legal or common English language?

II. Does the denial of a jury trial to Petitioner on statutory petty offense grounds:

   A. Extend the Common Law beyond the traditional bounds?

   B. Apply when Petitioner was granted a JURY TRIAL at the original arraignment, and subsequently had the JURY TRIAL withdrawn two days prior to the trial, thus denying Petitioner the Fifth Amendment right to Due Process of Law?

III. Were Petitioner's rights under the Fourth Amendment to be protected against unreasonable search and seizure and warrantless arrest violated?

IV. Was selective arrest and prosecution amounting to bad faith and harrassment employed by the IRS in order to suppress legitimate protest and in violation of Petitioner's rights under the First and/or Fifth Amendments?

V. Was the trial judge biased against Bray and/or Petitioner, thus depriving the Petitioner of his right to an impartial trial as guaranteed by the Sixth Amendment, the provisions of 28 U.S.C.A., 144, and due process of law?

VI. Should Petitioner's Motion for Severance have been granted?

VII. Was Petitioner's right to a speedy trial under the Sixth Amendment abrogated when the government failed to bring the case to trial?



## CONSTITUTIONAL PROVISIONS INVOKED

U.S. CONST. 1st Amend.:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. 4th Amend.:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. 5th Amend.:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person

be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. 6th AMEND.:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. 8th AMEND.:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.



## STATEMENT OF CASE

Jurisdiction of the United States District Court for the District of Utah, Central Division, occurred as the purported crime is a violation of 18 United States Code Section 701, and took place in Salt Lake City, Utah, within the jurisdiction of the court.

The Petitioner, Francis S. Goeltz, is and has been for over six years a very dedicated Conscientious Objector to procedures employed by government agencies which result in violence to the individual rights of the citizenry.

To the same end, the Petitioner has, for over three years, co-led a group which seeks the impeachment of Federal Judge Willis W. Ritter.

Petitioner was arrested without a warrant or formal charge by FBI and IRS agents on the night of April 19, 1973, and lodged in the Salt Lake County Jail. Petitioner, along with Robert George Wray and Karl Jack Bray, co-defendants, was charged by Misdemeanor Information, R1, Vol. I by the U. S. Attorney on April 20, 1973, of violating Title 18, United States Code, Section 701, ILLEGAL POSSESSION OF INTERNAL REVENUE INSIGNIA.

The affidavit for Issuance of Arrest Warrant by the U. S. Attorney is dated April 20, B 73, R2, Vol. I. The Warrant for Arrest of Petitioner is dated April 20, 1973, R3, Vol. I.

Petitioner, along with Bray and Wray, in full waist and leg chains, handcuffs and leg irons, was presented by the U. S. Marshall before the U. S. Magistrate on April 20, 1973. He was released on his own recognizance, R8, Vol. I.

Petitioner, with attorneys, was before Chief Judge Ritter, and ready for trial, on July 26, 1973, for Arraignment and Hearing on Motions. Vol. I. Petitioner pleaded not guilty. The Motion for Severance, R20, Vol. II, was denied, with leave to bring up the Motion again on the morning of the Trial. The Motion to Compel Disclosure, R23, Vol. II, was denied. The Motion to Dismiss, R22, Vol. II, was denied. The Motion to Suppress, R24, Vol. II, was deferred and then denied on March 11, 1974, Vol. II. Motion for JURY TRIAL was granted. The case was set down for JURY TRIAL on July 30, 1973, Vol. I, p. 15, R26, R27.

The U. S. Attorney filed a Bill of Particulars on July 27, 1973.

Notice vacating the JURY TRIAL for July 30, 1973, was mailed July 27, 1973.



A notice was mailed January 7, 1974, for Calling of Calendar and JURY TRIAL on January 9, 1974.

JURY TRIAL and Hearing on Petitioner's motion was again vacated on January 9, 1974. The Calling of Calendar and JURY TRIAL and Hearing on Petitioner's Motions for Severence and to Suppress and reset for February 4, 1974, by mailed notice January 22, 1974.

Bray timely filed an affidavit and Notion, R50 and 51, for Removal of Chief Judge Ritter for Prejudice.

Bray timely filed a Petition for a Writ of Mandamus or Writ of Prohibition, 19CA Misc. No. 74-8036, and the Tenth Circuit issued a Writ to Show Cause, on or before March 29, 1974, to the Hon. Willis W. Ritter, Chief Judge, R89.

The JURY TRIAL and Hearing of motions was again delayed from February 4, 1974.

On February 22, 1974, government took initial action to obtain their witnesses.

On March 11, 1974, Motions were presented by Petitioner's counsel and co-defendants. Petitioner's Motion to Sever was denied, Vol. II, p.3. Petitioner's new Motion to Dismiss was denied, Vol. II., p. 5. The Motion to Suppress was denied at that time with leave to renew it at the trial.

On March 13, 1964, Judge Ritter tried all three defendants together, without a jury, and found all three defendants guilty as charged. Notice of Appeal was timely filed, R88. The Hon. Judge Lewis, of the Tenth Circuit Court, signed an order March 25, 1974, that Petitioner be released on his own recognizance pending appeal.

On March 18, 1974, Petitioner filed a Notice of Appeal to the United States Court of Appeals, Tenth Circuit. The Tenth Circuit Court, January Term, 1975, heard appeals by attorneys for Petitioner, Bray and Wray on February 28, 1975. The judgement of the lower court was affirmed and judgement in accordance with that opinion was entered on March 21, 1975.



## REASONS FOR GRANTING WRIT

I. DOES THE APPLICATION OF 18 U.S.C., SECTION 701, TO THE CONDUCT OF PETITIONER:

A. DO VIOLENCE TO PETITIONER'S FIRST AMENDMENT RIGHTS TO FREE SPEECH AND FREEDOM OF EXPRESSION?

18 U.S.C. Section 701

"Whoever manufactures, sells, or possesses any badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph print, or impression in the likeness of any such badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both. June 25, 1948, c. 645, 62 Stat. 731."

1. A. The application of 18 U.S.C. Section 701, to the conduct of Petitioner, does violence to the First Amendment rights of Petitioner by inordinately and reprehensibly sanctioning the means of philosophical expression and action afforded him. Consequently, Petitioner is unable to fully participate in the open dialogue guaranteed free men. This without Due Process of Law.

The First Amendment rights are historically given little restraint, for the growth and refinement of a Free People depends in large measure upon their access to diverse opinions. In Aston vs. Kentucky, 384 U.S. 195, the U. S. Supreme Court states, "The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that set us apart from the totalitarian regimes...." and "When First Amendment rights are involved, we look even more closely lest under the guise of regulating conduct that is reachable by police power, freedom of speech or of the press suffer."

"Freedom of the press was not guaranteed solely to shield persons engaged in newspaper work. The larger purpose was to protect public access to information." See Bussey vs. U.S., 466 F2d 1059. In Cantwell vs. Connecticut, 310 U.S. 296, 60 S.C.T. 900, the Cantwell court took great care to emphasize that the First Amendment embraced not only the freedom to believe, but the freedom to act on behalf of one's beliefs as well. 310 U.S. at 303.



Further amplification is at Kovacs vs. Cooper, 336 U.S. 77 69 S.Ct. 448; Russo vs. Central School District, 469 F.2d 623; Visual Education v. Koeppel, 268 So.2d 22; Smity v. California 316 U.S. 147, 80 S.Ct. 215; Cramp v. Board of Public Information 386 U.S. 278-287, 82 S.Ct. 275.

Application of Section 701 to Petitioner results in Prior Restraint on First Amendment rights. In Alderman v. Philadelphia Housing Authority, 496 F.2d 164 (1974) the court stated that, "Any system of prior restraints comes to a court bearing a heavy presumption against its validity and, before it may be deemed justified, government must offer compelling proof that it is essential to a vital government interest. International Soc. for Krishna Cons., Inc. v. Conlisk, 374 F.Supp. 1010,1011, 1015-1018, and the Supreme Court have placed exacting standards on the U.S. v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1623, decision concerning the proof of a substantial governmental interest.

No vital government interest could exist here save the possible government need to shield its less acceptable actions from the public. Such actions would stand malevolently against the concept of sovereignty resting with the people, and in stark contrast to the intent of the Freedom of Information Act, 80 Stat. 250, Sec. 3. The repugnancy of prior restraint is well described in Doe vs. McMillan, 412 U.S. 306,344,

93 S.Ct. 2018 (opinion of Rehnquist, J); New York Times v. U.S., 403 U.S. 713, 714, 91 S.Ct. 2140, 2141; Emerson, the Doctrine of Prior Restraint, 20 Law and Contemporary Problems, (1955) and The System of Freedom of Expression (1971).

The construction of 18 U.S.C. Sec. 701 as a restraint on petitioner's rights under the First Amendment stands it in great peril of being in conflict with the U.S. Constitution. "Contemporaneous construction of a statute is of no weight where it's repugnancy to the Constitution is apparent." Stillman v. Lynch 192 P. 272, 12 A.L.R. 552. Where the Constitution prescribes one rule and a statute another, the courts should declare that the Constitution prevails. Dred Scott v. Sanford 19 U.S. 393; Marbury v. Madison, 1 U.S. 137. The rule is fixed that in a proper case the duty to declare a law unconstitutional cannot be declined by the courts, regardless of their opinion as to the wisdom of the statute. Lake County v. Rollins, 130 U.S. 662, 9 S.Ct. 651 Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855; U.S. v. Butler, 297 U.S. 1, 56 S.Ct. 312; McNary v. U.S., 195 U.S. 27, 24 S.Ct. 769.

The fact that the violation of the Constitution is not a great one is no reason for permitting it. The degree to which the organic law is violated has no standing for it is the duty of the courts to guard the rights of the people with great jealousy. Patton v. U.S. 281, U.S. 276, 50 S.Ct. 253; Looney v. Crane Co., 245 U.S. 178, 38 S.Ct. 85.



I. B. STRAIN THE LAW BEYOND THE INTENT OF THE ENACTING LEGISLATIVE BODY?

There is ample authority to suggest that 18 U.S.C. Sec. 701 is overly broad and vague, and thus unconstitutional as constructed by the courts below: Tollett v. U.S. 485 F.2d 1094 (8CA 1973); Trop v. Dulles, 356 U.S. 86; Smith v. Goguen, No. 72-1254, March 25, 1974, 39 L.ed. 2d 605; Plummer v. Columbus, 38 L.ed. 2d 3; Gooding v. Wilson, 31 L.ed. 2d 408, etc.

However, it is the fervent hope of Petitioner that Section 701 can be given the interpretation of the enacting legislators, hence preserving its Constitutionality and relieving it from distorted or strained construction. In Piper v. Willcuts, C.C.A. Minn. 64 F.2d 813; Dickey v. Raisin Production Zone 1, 151 P.2d, 505, 324 U.S. 869, the opinion of the court upheld an age-old dictum that the intention of the Legislature, embodied in a statute, is the law. "The court should give a construction which will render the statute valid....", Hunter v. Hunter, 180 F.2d 510, S.Ct. 234.

The court's long-standing and wise deference to the intergrity of the Legislature and their enactments has produced ample authority to sustain this opinion. The general rule is that by all means available, unless in contradiction to the Constitution, the interpretations or purpose of the Legislature as expressed in the statute should prevail. Vermilya

Brown Co. Inc., et al. v. Connell et. al., 69 S.Ct. 140, 335 U.S. 377; U.S. et. al. v. N. . Rosenblum Truck Lines, Inc., 62 S.Ct. 445, 315 U.S. 50.

All legitimate and reasonable sources of enlightenment should be used for construction. The court should not be limited nor should it bias the written words of the act when the declaration of purpose is expressed in clear and unambiguous terms, for it is the solemn declaration of the sovereign. The court should, if possible, place on the statute a construction which will not result in injustice, oppression, hardship or inconvenience. U.S. v. Universal C.I.T. Credit Corp., 73 S.Ct. 227, 334 U.S. 218; A. Magnano Co., v. Hamilton, Atty., 54 S.Ct., 599, 292 U.S. 40; Lovesi v. Commonwealth of Virginia, 92 S.Ct. 2469, 407 U.S. 922; Perry v. Commerce Loan Co., 86 S.Ct. 852, 383 U.S. 392; U.S. v. Bologna, 181 F.Supp. 706; Burnet v. Guggenheim, 53 S.Ct. 369, 288 U.S. 280; Shaituck v. Gauagher, 218 F.2d 428.

Appendix B of this petition contains the legislative history of 18 U.S.C. Section 701 from its first inception eminating in the Justice Department to its concluding action in D 39. Contemporaneous circumstances and the habits of the people should be considered. U.S. v. Congress of Industrial Organizations et. al., 68 S.Ct. 1349, 335 U.S. 106.

The court has stated that, "The title and heading may be resorted to as an ascertainment of legislative intent."



F.T.C. v. Mandel Bros., Inc., 79 S.Ct. 818, 359 U.S. 385. Also, a message from the executive submitting the subject matter of a proposed statute to the legislature may be referred to for meaning. Homer Elec. Assn., Inc. v. City of Kenai, 423 P.2d 285; Clendaniel v. Conrad, 35 S. Ct. 203, 335 U.S. 712.

18 U.S.C. contains at Section 700 several other statutes, each relating to the misuse of some type of substantive badge or emblem. Of long standing is the cannon of construction-in pari materia.

Petitioner prays that the strained, distorted, vague and overly broad construction rendered by the courts, Justice Department and IRS below will be rendered ineffectual through the scrutiny of historic record and precedent.

I. C. REQUIRE UNREASONABLE ALTERATION OF THE WORDS INSIGNIA, IDENTIFICATION AND BADGE, EITHER IN LEGAL OR COMMON ENGLISH LANGUAGE?

Failure to resort to the contemporary and historic meaning of the words Badge, Insignia, Identification Card, and Seal through recourse to Law Dictionaries, court dicisions, common use distionaries, and the expressed words of Congress, has resulted in such a distorted semantic alteration of the words that the subject is treated separately here. Authority for such interrogation is U.S. v. Universal C.I.T. Credit Corp., supra.

The construction given in courts below does not fall within the guidelines imposed by U.S. v. Harris, 106,269, 4 S.Ct. 601; State v. Wittles, 118 Min. 364 136 NW 883; Yu Cong. Eng. v. Trinidad 271 U.S. 500, 46 S.Ct. 619, and others. Nor does it meet the standards of U.S. v. Walter 263 U.S. 15, 44 S.Ct. 10; Sproles v. Binford 286 U.S. 374, 52 S.Ct. 581; Mutual Loan Co. v. Martell 222 U.S. 225, 32 S.Ct. 74.

In order to simplify the court's research, Petitioner has included identified dictionary and legal descriptions here:

Badge: "Something noticeable worn on the person to indicate his connection with some enterprise, person, lodge, club, society, or matter. A sign of authority,



such as the star of a policeman or other law-enforcement officer." (Ballentines Law Dictionary, 3rd Edition).

"A mark or cognizance worn to show the relation of the wearer to any person or things, the token of office or service." (Black's Law Dictionary)

Card "A token of membership in a labor union, political party, fraternal order, or a credit-guaranty organization." (Ballantine)

Colorable Imitation "In the law of trademarks, this phrase denotes such a close or ingenious imitation as to be calculated to deceive ordinary persons." (Black's)

Identification "The means or act of identifying a person, an instrument, or property. Proof that a person or thing is the person or thing it is supposed or represented to be. Duval v. Atlantic Coast Line Railroad Co., 134 NC 331, 46 SE 750." (Ballentine's) (Black's does not refer to anything applicable here.)

Insignia "Coats of arms; armorial bearings; emblems of rank. Pins, badges or ribbons worn by members of a club. 6 Am. J.2d Asso. & C. § 17.

"In the days of chivalry and knight erranty, and at the present time, where distinctions are recognized by law, between wealth and other adventitious influences, and poverty or weakness, the adventurous and the great have adopted their

insignia, suggested by valorous achievement, or other causes. These are called their arms or family escutcheon, and are usually engraved on their seals. Kirksey v. Bates (Ala) 7 Port 529.

"As the term is used with reference to notarial seals, it means the armorial ensign of a state or political community intended to distinguish it from others, and which is usually transferred to its national flag or banner. Yet, perhaps a public flag cannot always be considered as a true indication of the arms of the country to which it belongs; for most countries have two banners--one borne by vessels of war, and the other by those engaged in commerce. Kirksey v. Bates (Ala) 7 Port 529." (Ballentine's)

"Ensigns or arms; distinctive marks; badges; indicia; characteristics." (Black's)

"Distinguishing marks of authority office, or honor; badges; emblems; as, the insignia or royalty or of an order. Typical and characteristic marks or signs by which anything is distinguished; as, the insignia of trade." (Webster's International 1955--pictured and listed below these definitions are 29 military insignia.)

Official Seal "The seal affixed to a document by a public officer. Kirksey v. Bates (Ala) 7 Port 529. The instrumentality for affixing a seal that goes with a public office as a part of the paraphernalia of office. Such a seal



must contain enough to show the official character of the officer and must be capable of making a distinct and uniform impression upon the paper upon which it is used, or on some tenacious substance such as was attached thereto, capable of receiving an impression. A seal in the form of a scrawl of the pen does not fill the requirements of an official seal. 47 Am.J. 1st §7." (Ballentine's) (Emphasis added)

Seal "Symbol of authenticity. An impression made by means of an instrument or device, such as an engraved metallic plate, on wax or wafer affixed to an instrument, or directly upon the instrument itself. A scroll or other distinguishing mark placed upon an instrument as a seal. The word "seal" placed upon an instrument. The abbreviation 'L.S.' placed upon an instrument as a legal seal. 47 Am.J. 1st Seals §4." (Ballentine's)

"An impression upon wax, wafer or other tenacious substance capable of being impressed. Solon v. Williamsburgh Sav. Bank, 114 N.W. 132, 21 N.E. 168.

"A particular sign, made to attest in the most formal manner, the execution of an instrument.

"Merlin defines a seal to be a plate of metal with a flat surface, on which is engraved the arms of a prince or nation, or private individual, or other device, with which an impression may be made on wax or other substance on paper or parch-

ment in order to authenticate them. The impression thus made is also called a 'seal'. Repert. Mot 'Sceau.'

"'Seals' serve as an authentication of an instrument and also as the badge of a specialty. Caruthers v. Peninsular Life Ins. Co., 150 Fla. 467, 7 So.2d 841, 842." (Black's)

A seal generally is an impression made by means of an instrument or device, such as an engraved metallic plate or stone, on wax or wafer affixed to an instrument, or directly upon the instrument itself. At common law and in early times, the impression was on wax or some other tenacious substance capable of receiving and retaining it; Cromwell v. Tate (Va) 7 Leigh 301; and this form has to some extent been retained up to the present time. Perrine v. Cheeseman, 11 NJL 174.

In the legislative entries concerning the writing of Section 701, Appendix B, there is an obvious intent to prevent the unauthorized possession of a physical entity,--badge, identification card or OTHER insignia. The letters from the Attorney General obviously describe a concern with the possession of substantive things, --badges, identification cards, insignia as for military, public health, law enforcement and so forth, such that a blind person could readily identify it by feel. The 1939 addition to the act simply includes a



proviso to prevent counterfeiters or forgers from having a readily available photograph or other reproduction with which to spend considerable time copying the design for engraving or stamping on a badge, identification card or other insignia.

An equivalancy exists between "badge". "identification card" and "insignia" in their substantive sense. The removal of the word insignia from association with badge and identification card in order for the IRS, Justice Department and courts below to secure an arrest and conviction is a gross insult to the intelligence and integrity of the Legislators who wrote the law, the Executive which prior to this time has asked for, and administered the law, and to this court. It renders the phrase "or other" meaningless and denies the dictates of English authority.

In every instance the framers of the law used the initial or primary definition of the word "insignia" in order to tie it securely to the words "badge", "identification" and "card".

The language of a statute must be construed in accordance with its meaning at the time of its enactment. Amos v. Prom, Inc., 117 F.Supp. 615; Whitney v. Wyman 11 Oho. (101 U.S.) 392, 25 L.ed. 1050; Steward v. Kahn, 11 Wall. (78 U.S.) 493, 504; Perry v. Commerce Loan, supra.

Please note that in the Tenth Circuit decision, Appendix A., and in the

trial court proceedings the words "seal", "badge", and "insignia" were repeatedly interchanged. From authorities herein it is apparent that such interchange is permissable between "seal", "badge", and "identification card" and "insignia".

There is substantial authority to indicate what the intentions of the enacting legislature were and how the Executive branch of government, through their officers and prosecutors, intended to use the law. A history of prosecution under 18 U.S.C. Sec. 701 for possession does not exist except for possession of an identification card or badge, and those involving the military. "The contemporaneous construction of a statute may be found by noting the construction given by the officers or departments charged with executing it.": C.J.S. 359; U.S. v. Cooper Corp. 61 Sct. 742; St. John v. New York, 201 U.S. 633, 50 L.ed. 898, 26 S.Ct. 554; U.S. v. Reynolds 235 U.S. 133, 59 L.ed. 162, 35 S.Ct. 86; Mid-Continent Petroleum Corp. v. N.L.R.B. Ca. 74 S.Ct. 71, 346 U.S. 858; Amos v. Prom Inc., supra; Tuttle v. National Bank 44 N.E. 984; Myles Salt Co. v. Iberia and St. M. Drainage District, 239 U.S. 478, 60 L.ed. 392, 36 S.Ct. 204.

Appendix B, No. 6, is an exact copy of the Library of Congress' regulations concerning the photocopying of government materials.

For good cause shown, petitioner believes the proper reading of Section 701 will show that no crime has been committed by him and that the intentions of the legislators were honorable.



## II. DOES THE DENIAL OF A JURY TRIAL TO PETITIONER ON STATUTORY PETTY OFFENSE GROUNDS:

## II. A. EXTEND THE COMMON LAW BEYOND THE TRADITIONAL BOUNDS?

The denial of a Jury Trial to Petitioner on statutory petty offense grounds results in the imposition, upon conviction, of penalties which far exceeded the concept of petty under common law.

"As respects right to jury trial, the rule permitting greater safeguards of property rights than right to personal liberty, based on the fact that punishment for misdemeanor may in some cases involve a trifling restraint of liberty and a property loss which is ruinous, is limited to those cases where consequential and immediate effects are disproportionate." C.S.S. 77; People v. Herk, 44 N.Y. 5 2d 444. For prescribing penalties which prevent jury trial see Saco v. Wentworth, 37 ME 165.

Petitioner here states that the property loss which will most likely be incurred by Petitioner will include loss of residence, loss of employment with little change of re-employment, and a direct personal loan loss in excess of $11,000, FR.

II. B. APPLY WHEN PETITIONER WAS GRANTED A JURY TRIAL AT THE ORIGINAL ARRAIGNMENT, AND SUBSEQUENTLY HAD THE JURY TRIAL WITHDRAWN TWO DAYS PRIOR TO THE TRIAL, THUS DENYING PETITIONER THE FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW?

Petitioner was granted a jury trial on July 26, 1973, by Motion, and proceeded under that assumption until two days prior to the trial, March 11, 1974. Having prepared for a jury trial with all its securities, rather than for a summary proceeding before a known adversary, Petitioner was deprived of due process under the Fifth and Sixth Amendments. The court's procedural error prejudiced defendant's defense. Farmer v. Loo-Fourrow, 267 P.2d 113, 41 ALR 2d 774.



III. WERE PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT TO BE PROTECTED AGAINST UNREASONABLE SEARCH AND SEIZURE AND WARRANTLESS ARREST VIOLATED?

Petitioner's rights to be protected under the Fourth Amendment against unreasonable search and seizure and warrantless arrest were grievously violated.

The Affidavit for Issuance of Warrant, R2, in support of the misdemeanor information and issued April 20, 1973, fails to set forth sufficient personal knowledge of facts by the U.S. Attorney. Giordenello v. U.S., 357 U.S. 480.

At Page 75, Vol. III, Agent Stephens testified:

Q: Did you discover any violations of the Internal Revenue Code?

A: No Sir.

Agent Stephens, the undercover operative for the IRS would have been the man to know whether the Petitioner had ever violated the IRS Code. His statement under oath clears Petitioner of any possible charges under 26 U.S.C. Sec. 7206 or 7212 and refutes the Circuit Court's ascertion on page 7, Appendix A., that Petitioner could have been charged under any IRS STATUTES. As to 18 U.S.C. Sec. 506, it describes the use or manufacture of false seals, and is not appli-

cable for the reasons stated under I.(C.) supra; and that no action was initiated by Petitioner towards the use of the notices; and possession was not with fraudulent intent. From Volume III, p. 59 Agent Stephens testifies:

A: Publicity is one of the main goals.

Q: And it was discussed...that the purpose of these notices...was to be used to call the public's attention to the IRS?

A: That is one of the purposes.

From Vol. III, p. 88: By stating that the question has been answered to their satisfaction the Court and prosecutor affirmed that the only reason for using the seizure notices was to advance philosophical ideas.

No grounds for a Probable Cause arrest for felony were ever evidenced against Petitioner. In Johnson v. U.S., 333 U.S. 10, the Court held that evidence obtained by search should have been suppressed on grounds that the search was made without a warrant. The IRS knew of the activities of Petitioner in this matter for at least 14 days prior to the arrest. A search without warrant should not be made where the opportunity exists for issuance of one. Carroll v. U.S. 267 U.S. 132; Angello v. U.S. 269 U.S. 20; U.S.v. Viale, 312 F.2d 595 (2d Cir. 1963); Title 28, U.S.C.A. 7608 (b); Price v. U.S. 262 F.2d 684; Reed v. State,



25 S.E. 2d 692; Yancey v. Fidelity & Casualty Co., 100 S.E. 2d 653, certiorari denied 213 Ga. 903, 102 S.E. 2d 497.

There exists grave doubt that any magistrate would have signed a warrant on such untenable grounds.

IV. WAS SELECTIVE ARREST AND PROSECUTION AMOUNTING TO BAD FAITH AND HARRASSMENT EMPLOYED BY THE IRS IN ORDER TO SUPPRESS LEGITIMATE PROTEST AND IN VIOLATION OF PETITIONER'S RIGHTS UNDER THE FIRST AND/OR FIFTH AMENDMENTS?

Petitioner and Bray were singled out by agents of the IRS for harrassment and prosecution. Petitioner has been a leader in the citizen's quest for more responsible government for over six years. This has placed him in strong adversary position viz. a viz. certain government agents.

The court in Krishna v. Conlisk, supra, 1014, found the government participating in bad faith harrassment of the plaintiffs for preventing their assembly and soliciting funds. Also the court found that there was no valid state interest being served which would justify the inhibitions the ordinance imposed on First Amendment rights, page 1016. At page 1017, the court said, "There is no question as to the legitimacy of these significant state interests. These ordinances, however, do nothing to further those interests except by the most strained construction and overbroad effect. Like the peddling ordinances, neither of these provisions in any way regulates the behavior of persons authorized to solicit."

The Petitioner's case hinges closely to the Krishna case, supra, and the Alderman case, supra.



See also Cantwell v. Connecticut, supra; Alderman v. Philadelphia Houseing Authority, supra; Polk v. The State Bar of Texas 374 F.Supp. 784 (1974)... "The state had no interest to punish and issuance of reprimand would be violative of First Amendment rights."

Appendix C. contains an affidavit and exact duplicate of an IRS seizure notice - WITH SEAL - which the IRS gave Miss Fightmaster and then duplicated for her. This absolutely demonstrates the propensity of the IRS toward PROSECUTING CERTAIN CITIZENS for doing what their policy and employees sanction. Petitioner is the victim of invidiously selective enforcement and has been forced to curtail his tax protest meetings for fear of threatened arrests and other forms of harrassment. Krishna v. Conlisk, supra, 1013.

V. WAS THE TRIAL JUDGE BIASED AGAINST BRAY AND /OR PETITIONER, THUS DEPRIVING THE PETITIONER OF HIS RIGHT TO AN IMPARTIAL TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT, THE PROVISIONS OF 28 U.S.C.A. 144, AND DUE PROCESS OF LAW?

For over three years the Petitioner has co-led with Bray a group which seeks the impeachment of Federal Judge Willis Ritter on the grounds of gross violations of the Cannons of Judicial Ethics. Public media speaking about a petition designed to effect an empeachment in 1972-73 has placed Petitioner in an adversary position with Judge Ritter.

Chief Judge Ritter was reviled by Petitioner and Bray, thus causing a hostile atmosphere in the courtroom. 46 Am. Jur. 2d. Cases are to be tried by unprejudiced and unbiased judges. Section 166. Where friction of a personal nature has developed, the Judge should disqualify himself, Section 172.

In 21 Am. Jur. 2d, Criminal Law, persons charged with a crime have a fundamental right to a fair and impartial trial and the duty to provide same rests with the court, Section 234; a fair trial means trial before an impartial judge in an atmosphere of judicial calm, Section 235. See U'Ren v. Bagley, 245 P. 1074. Where fairness was flouted the indictment was set aside. Saldana v. U.S. 365 U.S. 646.



"A judge must accept as true every allegation of fact made as a predicate of belief." Morrison v. U.S. (D.C. Tex. 1969, 321 F. Supp. 286 affirmed 432 F. 2d 1227, certiorari denied al S.Ct. 1959, 401 U.S. 945, 28 L.ed. 2d 227; E. G. Wolfoson v. Pamieri, C.A.N.I. 1968, 396 F.2d. 122.

Petitioner could fairly believe that Judge Ritter would be biased against Petitioner as contemplated in 28 U.S.C.A. 144, Cranston v. Freeman, S.C. N.Y. 1968, 190 F. Supp. 785, Reversed on other grounds 428 F.2d 822, certiorari denied 91 S.Ct. 937, 401 U.S. 949.

Petitioner was denied the right of effective cross examination, David v. Alaska, 39 L.ed. 2d 347 at page 555.

A tribunal to try cases must not only be unbiased but must avoid the appearance of bias. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145.

By making charges against Petitioner on a repeated basis, Vol. III, pages 36 - 164, and not predicating decision on the matter being tried, the trial judge denied Defendant the opportunity to be properly accused, and to plead and prepare for defense. U.S. v. Patterson, 456 F.2d 1135 (1972).

Petitioner was unable to take witness stand in order to refute the statements of IRS and FBI agents. The hateful atmosphere made Petitioner fearful of further charges and unreasoned contempt of court.

Be advised that Petitioner did not say one word during the entire trial.



## VI. SHOULD PETITIONER'S MOTION FOR SEVERANCE HAVE BEEN GRANTED?

Rule 14 F.R.Cr. P. states, "Must be alert to accord to every defendant a completely fair trial." Therefore, the 5 CA in Barton v. U.S. 263 F.2d 894, was reversed and remanded since the District Court had stated, "I believe we can control the evidence without severance." The actions of Bray and Wray proceeding Pro Se for seven months after arraignment left Petitioner in an uncontrolled situation. Motion for Severance was timely filed on adequate grounds, R20.

At least a trial before an unbiased judge is essential to due process. Johnson v. Miss., 403 U.S. 212, reversed and remanded; Mayberry v. Penn., 400 U.S. 455.

VII. WAS PETITIONER'S RIGHT TO A SPEEDY TRIAL UNDER THE SIXTH AMENDMENT ABROGATED WHEN THE GOVERNMENT FAILED TO BRING THE CASE TO TRIAL?

Petitioner was arrested on April 19, 1973 and charged by petty offense information on April 20, 1973, R8. Arraignment was on July 26, 1973 at which time Petitioner motioned for and was granted a jury trial, Vol. I. Jury trial was set down for July 30, 1973; Vol. I, p. 15, R26, R27.

Notice vacating the jury trial for July 30, 1973 was mailed July 27, 1973, Vol. V. Petitioner drove over 200 miles round trip from his home in order to appear because notice had not been received.

A notice was mailed January 7, 1974, for Calling of Calendar and Jury Trial on January 9, 1974, Vol. V. Petitioner cancelled a trip with his employer and drove the 200 miles again, only to have the trial vacated.

On January 22, 1974, after Petitioner's February flight assignments had been published, a notice for Hearing on Motions for Severance and to Suppress was set for February 4, 1974, Vol. V. Petitioner re-scheduled his flying for the month of February and appeared. Once more the Jury Trial and hearing of motions was delayed.



On March 11, 1974, Petitioner appeared along with council and co-defendants for Hearing of Motions. Petitioner's Motions for Severance and Motion to Dismiss for lack of speedy trial were both denied.

At no time did Petitioner delay the proceedings. Petitioner was completely prepared for jury trial by July 26, 1973, seven months prior to the actual trial. The record reflects that a period in excess of five and one-half months went by after arraignment without Petitioner's co-defendants delaying the proceedings at all. During this time the government took absolutely no action to bring the case to trial.

The delay was excessive, the trial being eleven months after date of arrest. Rule 48 (b) of the Federal Rules of Criminal Procedure authorizes dismissal of an information if there is "unnecessary delay" in bringing defendants to trial. See post arrest situation, U.S. v. Marion 404 U.S. 307.

Petitioner was required to file written reports of his flight schedule, R18, R19, R31, R 42, R69, for this entire period, during which time he also had to make repeated changes in his work/flight schedule due to the short-notice appearances required by the court. While performing his flight duties outside this country for periods of ten days and more, Petitioner was under continuous emotional stress due to the uncertainties involving

scheduling of proceedings. Not knowing how co-defendants would proceed and what the court's reactions to the three co-defendants would be created a very tense and frustrating situation on an everyday basis.

In Strunk v. U. S., 412 U.S. 434 (1973) ten months was too long a delay and the Supreme Court set aside the judgement, vacated the sentence and dismissed the indictment, saying "The speedy trial guarantee recognizes that prolonged delay may subject the accused to an emotional distress that can be produced and result in the ordinary person from uncertainties."

Petitioner's Motion to Dismiss, R66, should have been granted. It has been held in Dickey v. Florida, 398 U.S. 30 (1970) by Justice Brennan that the Demand Waiver Rule should be rejected. In Barker v. Wingo, 407 U.S. 514, Justices White and Brennan declared that the government could not justify delay in ordinary criminal cases simply by asserting that because its resources are limited each case must wait its turn. The delay, they believed, should relate only to the facts themselves.

Petitioner is unable to carry the burden of delay beyond his own control, for the government has caused it.



## C O N C L U S I O N

Petitioner prays that the petition for Writ of Certiorari be granted the Decisions below are not in accord with applicable Decisions of this Court and the Legislature of the United States.

Respectfully submitted,

FRANCIS S. GOELTZ

Route 1, Box 48A
Fairview, Utah 84629

Petitioner, In Pro Per

Before BREITENSTEIN, McWILLIAMS, and DOYLE, Circuit Judges.

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BREITENSTEIN, Circuit Judge.

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Defendants-appellants Goeltz, Bray, and Wray were charged in a one-count information with possession of official insignia in violation of 18 U.S.C.§701. Each was found guilty after trial to the court and appeals. We affirm.

Defendants demanded, and were refused, a jury trial. Section 701 authorizes a maximum penalty of six months imprisonment, a $250 fine, or both. The sentences for Goeltz and Bray were for six months imprisonment and a $250 fine. Wray received three years probation and a $250 fine. Section 1(3), 18 U.S.C., defines a petty offense as a misdemeanor the penalty for which does not exceed six months imprisonment or a $500 fine or both. The provisions of the Constitution, Art. III, § 2, cl. 3, and the Sixth Amendment, relating to jury trials in criminal cases do not apply to petty offenses. Frank v. United States, 395 U.S. 147, 148. See also Taylor v. Hayes, 94 S.Ct. 2697,2701 and cases there cited. Curtis v. Loether, 94 S.Ct. 1005, has no pertinence. The concern there was with the Seventh Amendment provision for jury trial in suits at common law where the value in controversy exceeds $20. Denial of jury trial in the instant case was proper.



Section 701 proscribes the possession of any "badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof,* * * except as authorized under regulations made pursuant to law * * *."

The charge relates to an Internal Revenue Service seizure notice. It bears the seal of IRS in the upper left-hand corner and reads:

"WARNING

UNITED STATES GOVERNMENT SEIZURE

This property has been seized for nonpayment of internal revenue taxes, by virtue of levy issued by the District Director of Internal Revenue. All persons are warned not to remove or tamper with this property, in any manner, under severe penalty of the law."

The design was prescribed by IRS and the form was for use of revenue offivers of grade nine or higher for the collection of federal taxes by the seizure of property.

An undercover IRS agent infiltrated a Salt Lake City group participating in a tax protest movement. At an April 5, 1973, meeting conducted by Goeltz, Bray said that seizure cards would be placed on automobiles, that this would cause irate citizens to call IRS; and that good publicity would result. Later Bray

told the agent that about 2,000 notices had been printed and that "we are going to do some midnight riding." At an April 19 meeting, attended by the three defendants and others, in Bray's office, Goeltz displayed the seizure notices and said that he had received them "out of the blue." The notices bore the facsimile signature of "Lloyd Fries-Revenue Officer." Goeltz told the group that the notices should be discreetly placed where IRS agents would normally place them; that if anyone was caught he should state that he was replacing what apparently had fallen off; and that a person should not have more than one notice in his possession at one time. Bray said that gloves should be worn to avoid leaving fingerprints. Goeltz added that a stack of notices would be left on the table and that each should take some as leaving the meeting. Shortly after the meeting broke up, agents arrested the three defendants, each of whom had a large number of the notices in his possession. None of the defendants were IRS officers.

Defendants say that § 701 is vague and overly broad and hence violates due process requirements. The attack is against the word "insignia" and the phrase "colorable imitation." Their clandestine activities show, and the court found, defendants knowledge of unauthorized possession and intent to violate § 701. Defendants acts were not unwitted, unintended or inadvertent. See Morissette v. United States, 342 U.S. 246, 270. They were done knowingly with intention



to harrass innocent citizens and embarrass IRS. In assessing vagueness, a statute must be considered in the light of the conduct with which a defendant is charged. See United States v. National Dairy Products Corp., 372 U.S. 29, 32-33.

The attached provisions are not indefinite, vague or uncertain. Webster's New International Dictionary, 2d ed., defines insignia as meaning "distinguishing marks of authority, office, or honor." Black's Law Dictionary defines "colorable imitation" to mean "such a close or ingenious imitation as to be calculated to deceive ordinary persons." When measured by common understanding and practice, the challenged language conveys a sufficiently definite warning as to the proscribed conduct. United States v. Petrillo, 332 U.S. 1, 8. We find no unconstitutional infirmity in § 701.

Next, defendants argue that the statute does not apply to them. Using the principle of ejusdem generis, they say that the reference to "badge, identification card, or other insignia" limits insignia to badges and identification cards. Ejusdem generis is a canon of construction and may not be used to defeat the intent of Congress. United States v. Alpers, 338 U.S. 680, 682, and Gooch v. United States, 297 U.S. 124, 128. The enactment of § 701 was intended to protect the public against the use of a recognizable assertion of authority with intent to deceive. Defendants' conduct was well within the statute's proscription.

Defendants say that their acts were for the promotion of their political and philosophical views on taxation and, hence, were within the free speech protection of the First Amendment. It is difficult to relate the defendants' possession of simulated seizure warnings to the communication of ideas. Defendants' conduct was of the dirty-trick variety and was for the purpose of enraging its victims and annoying IRS.

If this non-speech activity had any idea-communication overtones, the First Amendment is no protection. The constitutional power to lay and collect taxes is broad and sweeping. Const. Art. I, § 8, cl. 1, and Sixteenth Amendment. Collection of taxes by distraint and seizure is authorized. 26 U.S.C. § 6331. The warning which defendants simulated was a proper notice of seizure. The protection which § 701 affords constitutionally furthered an important and substantial governmental interest unrelated to the suppression of free expression. The incidental, if any, restriction on First Amendment rights "is no greater than is essential to the furtherance of" the governmental interest. United States v. O'Brien, 391 U.S. 367, 376-377. Defendant's First Amendment claim has no merit.

Defendants assert that they were unlawfully arrested because the charge was a misdemeanor not committed in the presence of the officers. One officer saw each defendant take possession of some of the simulated warnings and communicated his observations to his associates.



Consideration must be given to the collective knowledge of all the officers involved. United States v. Sheppard, 10 Cir., 455 F.2d 1081, 1083. Also the information of the officers sufficed to furnish probable cause for belief that at least three felonies, e.g. 18 U.S.C. § 506 (possession of a counterfeit seal), 26 U.S.C. §7206 (false statements) and §7212 (corrupt interference with administration of IRS laws), had been committed. The subsequent charge of a misdemeanor does not affect the legality of the arrests. The arrests, and the searches incidental thereto, were legal.

Defendants complain that they were not given a speedy trial. The arrests were on April 19, 1973; the information was filed on April 20, and the trial was on March 13, 1974. Between May 29, 1973, and March 11, 1974, defendants filed about 24 motions. At all times after April 20 defendants were released on personal recognizance.

In Barker v. Wingo, 407 U.S. 514,530, the Court said that a balancing test requires court approach to speedy trial problems on an ad hoc basis. Four factors which should be assessed are length of delay, reason for the delay, defendant's assertion of his rights, and prejudice to defendant. In the instant case the delay was about 11 months and was due in large part to defense tactics. The government never requested any delay. Defendants did not assert a right to speedy trial. The record does not show any pre-

judice to any defendant because of the delay. No Fifth or Sixth Amendment rights of any defendant were denied by the delay. See United States v. Merrick, 10 Cir., 464 F.2d 1087, 1090-1091, cert. denied 409 U.S. 1023.

The claim of insufficient evidence to sustain the convictions borders on the frivolous. The evidence, which we have outlined in part, shows that each defendant knowingly and intentionally possessed reproductions of the official IRS warning of seizure under levy bearing the IRS seal and purporting to be signed by an IRS officer.

Arraignment was on July 26, 1973. The case was later set for trial on January 9, 1974, and eventually tried on March 13. On January 24, 1974, Bray filed a motion charging Judge Ritter with bias and prejudice and asking that the trial be before another judge. Bray's appointed counsel sought to withdraw the motion but Bray would not permit him to do so. The motion falls far short of meeting the requirements of 28 U.S.C. § 144. It was untimely. It states conclusions rather than facts and shows at the most that Bray did not like Judge Ritter not that Judge Ritter was prejudiced against Bray. A decision against Bray in another case does not show prejudice. The motion was properly denied. Knoll v. Socony Mobil Oil Company, 10 Cir., 369 F.2d 425; 429-430, cert. denied 386 U.C. 977.



Defendants say that they did not have a fair trial because of the conduct of the judge. To support their claim they take numerous incidents out of context. On consideration of the entire record we are convinced that the judge exercised commendable restraint in the face of impertinent and contemptuous behavior. The trial was to the court. The judge did no more than that necessary to keep the proceedings within reasonable bounds. Cooper v. United States, 10 Cir., 403 F.2d 71, 73. A party may not taunt a judge into a reprimand and then on appeal claim the reprimand was justification for a new trial. These defendants had a fair trial and were properly convicted.

Affirmed.

APPENDIX B

UNITED STATES SENATE AND HOUSE OF REPRESENTATIVES REPORTS WHICH PASSED AS PUBLIC LAW 206, No. 14313, AND S. 1281, TO BECOME:

18 U.S.C. SEC. 701

PROVIDING AGAINST MISUSE OF OFFICIAL BADGES

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May 19, 930. - Ordered to be printed

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Mr. Herbert, from the Committee on the Judiciary, submitted the following

R E P O R T

(To accompany S. 1985)

The Committee on the Judiciary, having had under consideration the bill (S. 1985) providing against misuse of official badges, reports the same to the Senate and recommends that the bill do pass with the following amendment:

At the end of the bill, add the following section:

Sec. 2. Any person who offends against the provisions of this act shall, on conviction, be punished by a fine not exceeding $250 or by imprisonment for not exceeding six months, or by both such find and imprisonment.

This amendment is proposed in order to correct the inadvertent omission of the penalty clause from the bill when

introduced. Amended in this manner, the bill is identical with the measure as it passed the Senate on February 21, 1929.

The need for this legislation is indicated by the following language contained in a letter from the Department of Justice under date of December 2, 1927:

> It has come to the notice of the department that it is possible for any unauthorized person to procure from certain merchants or manufacturers badges similar to or identical with those prescribed for the use of deputy United States marshals. It may be that other prescribed badges, such as those designed for the use of special agents of the Bureau of Investigation of this department and those which it may be found desirable to prescribe for the use of penitentiary guards and probation officers, can be procured now or in the future with equal facility by unauthorized persons. It is obvious that the possession of such insignia of official status by unauthorized persons may easily result in gross imposition upon the public.



No. 2

# PROHIBIT MISUSE OF OFFICIAL BADGES

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April 12, 1932.-Referred to the House Calendar and ordered to be printed

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Mr. Sumners of Texas, from the Committee on the Judiciary, submitted the following

## R E P O R T

(To accompany H. R. 10590)

The Committee on the Judiciary, to whom was referred the bill H. R. 10590, after consideration, report the same favorably with an amendment and recommends that the bill as amended do pass.

The committee amendment is as follows:

Page 1, line 6, after the word "officer" strike out the word "of" and insert in lieu thereof the word "or".

The purpose of this bill is to provide against misuse of official badges, identification cards, and other insignia designed for the use of public officers. The legislation is recommended by the Attorney General, who, in his letter to the chairman of the committee under date of December 7, 1931, states:

> It has come to the notice of the department that it is possible for any unauthorized person to procure from certain merchants or manufacturers badges and other insignia similar to or identical with those prescribed

for the use of officers of the United States. You can readily appreciate the prejudice to the public occasioned by the use and possession of such badges and insignia by unauthorized persons.



No. 3

# PROVIDING AGAINST MISUSE OF OFFICIAL BADGES

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April 29 (calendar day, May 3), 1932.-
Ordered to be printed

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Mr. Waterman, from the Committee on the Judiciary, submitted the following

## R E P O R T

(To accompany S. 940)

The Committee on the Judiciary, having had under consideration the bill S. 940, to provide against misuse of official badges, identification cards, and other insignia designed for the use of public officers, reports the same favorably to the Senate and recommends that the bill do pass.

The purpose and desirability of this legislation are set out in the following memorandum which was sent to the committee by the Department of Justice:

This bill is designed to prohibit the unauthorized possession and use of any badge, identification card, etc., prescribed by the head of any governmental agency for use by any officer or employee thereof, or of any colorable imitation thereof.

It has come to the notice of the department that it is possible for any unauthorized person to procure from certain merchants or manufacturers badges

similar to or identical with those prescribed for the use of deputy United States marshals; and it may be that other prescribed badges may be similarly procured. It is obvious that the possession of such insignia of official status by unauthorized persons may easily result in gross imposition upon the public.

A similar bill, but relating only to badges, passed the Senate in the Seventieth Congress (S.2213) and also in the Seventy-first Congress (s.1985), but in neither case was it finally enacted. The present bill, S. 940, is extended to cover the misuse of identification cards and other insignia as well as badges.



No.4

# PROHIBITING REPRODUCTION OF OFFICIAL INSIGNIA

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March 6, 1939.-Ordered to be printed

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Mr. Logan, from the Committee on the Judiciary, submitted the following

## R E P O R T

(To accompany S. 128)

The Committee on the Judiciary, to whom was referred the bill (S. 1281) to prohibit reproductions of official badges, identification cards, and other insignia, after consideration, report the bill favorably with the recommendation that it do pass.

Appended hereto and made a part hereof is the letter from the Attorney General recommending the enactment of the bill, and an explanation of its merits.

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Department of Justice
Washington D. C.
February 7, 1939

HON. HENRY F. ASHURST,
Chairman, Committee on the Judiciary
United States Senate.

My Dear Senator: Existing law prohibits the unauthorized manufacture, sale, or possession of official badges, identifi-

cation cards, or other insignia. It does not comprehend, however, the reproduction of photographs, engravings, or other likenesses of official badges in periodicals or other similar publications. Such reproductions are highly undesirable as they at times enable unauthorized persons to counterfeit such badges, etc. I have in mind more particularly the reproduction of the badges and identification cards of the Federal Bureau of Investigation which, in the interest of the public, must be safeguarded against counterfeiting by imposters and other unauthorized individuals.

With that end in view, I recommend the enactment of the enclosed proposed bill drafted in the Department of Justice, to extend the prohibitions contained in the above-mentioned statute to photographing, printing, or otherwise reproducing the likeness of any official badge or identification card or other insignia.

With kind regards,

Frank Murphy,
Attorney General



No. 5

# PROHIBITING REPRODUCTION OF OFFICIAL INSIGNIA

May 8, 1939.-Referred to the House Calendar and ordered to be printed

Mr. Walter, from the Committee on the Judiciary, submitted the following

## R E P O R T

(To accompany S. 1281)

The Committee on the Judiciary, to whom was referred the bill (S. 1281) to prohibit the reproductions of official badges, identification cards, and other insignia, after consideration, report the same favorably to the House with the recommendation that the bill do pass.

Unauthorized manufacture, sale, or possession of badges, identification cards, and insignia of United States officers is prohibited by existing law. The Attorney General recommends that this prohibition be extended to unauthorized photographing, printing, or reproduction of such badges, cards, and insignia, or colorable imitations thereof.

The proposed legislation was introduced in the House as H. R. 4049 and in the Senate as S. 1281. Inasmuch as the Senate bill has passed the Senate, it is reported in lieu of the House bill.

The letter of the Attorney General to the Speaker of the House recommending the proposed legislation follows:

Department of Justice
Office of the Attorney General
Washington, D. C.
February 7, 1939.

HON. WILLIAM B. BANKHEAD,
The Speaker, House of Representatives
Washington, D. C.

My Dear Mr. Speaker: Existing law prohibits the unauthorized manufacture, sale, or possession of official badges, identification cards, or other insignia. It does not comprehend, however, the reproduction of photographs, engravings, or other likenesses of official badges in periodicals or other similar publications. Such reproductions are highly undesirable as they at times enable unauthorized persons to counterfeit such badges, etc. I have in mind more particularly the reproductions of the badges and identification cards of the Federal Bureau of Investigation, which, in the interest of the public must be safeguarded against counterfeiting by imposters and other unauthorized persons.

With that end in view, I recommend the enactment of the enclosed proposed bill drafted in the Department of Justice, to extend the prohibitions contained in the above-mentioned statute to photographing, printing, or otherwise re-



producing the likeness of any official badge or identification card or other insignia.

With kind regards,
Sincerely,

Frank Murphy, Attorney General

In compliance with clause 2a of rule XIII, existing law is printed below in roman, with new matter proposed to be inserted printed in italic. No matter is proposed to be omitted.

That hereafter the manufacture, sale or possession of any badge, identification card, or other insignia, of the design prescribed by the head of any department or independent office of the United States for use by any officer or subordinate thereof, or of any colorable imitation thereof, *or the photographing printing, or in any other manner making or executing any engraving, photograph, print, or impression in the likeness of any such badge, identification card, or other insignia, or of any colorable imitation thereof,* is prohibited, except when and as authorized under such regulations as may be prescribed by the head of the department or independent office of which such insignia indicates the wearer is an officer or subordinate.

No. 6

LIBRARY OF CONGRESS' POLICY ON
COPYING OF MATERIALS BELONGING
TO GOVERNMENT

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Special Notice to Readers

The following materials may not be photocopied:

a. Obligations or securities of the U. S. Government, such as paper money, Federal Reserve Notes, etc.
b. Adjusted compensation certificates for veterans of The World Wars
c. Obligations on securities of any foreign government, bank or corporation.
d. Certificates of citizenship or naturalization
e. Passports
f. Immigration Papers
g. Draft Registration cards
h. Selective Service induction papers
i. Automobile licenses, drivers licenses and similar documents
j. Badges, identification cards, passes or insignia carried by military or Navel personnel, or by members of the various Federal Departments and Bureaus, such as the F.B.I., Treasury, etc.

APPENDIX C

AFFADAVIT AND INTERNAL REVENUE

SEIZURE NOTICE

I hereby affirm that on May 1, 1975, I walked from Hastings Law School to the Federal Building in San Francisco for the purpose of obtaining an Internal Revenue Service property seizure sticker. Ms. Christine Tejada was present in the law library when I left at 10:55 a.m. and knew of my intentions.

Upon entering the Investigations Office of the I.R.S., Room 4427, I requested the sticker from a receptionist/secretary, Ms. Patti Nicolson. She obtained the document (Publication No. 34) for me along with a heavy-weight manila card of the same nature (Publication No. 180).

Then, I asked if it would be possible to use their Xerox machine to copy the documents. She willingly made the copies herself, and one is attached. I received both publications and the ten copies (approximately) at 11:10 a.m. Ms. Janice Gardner, another I.R.S. receptionist/secretary, had been at her desk within hearing distance during the entire time the exchange between Ms. Nicolson and me took place.

I arrived back at the Hastings Law School library at 11:15, showed the papers to Ms. Tejada, and related the episode to her.

Robin P. Fightmaster

Robin P. Fightmaster

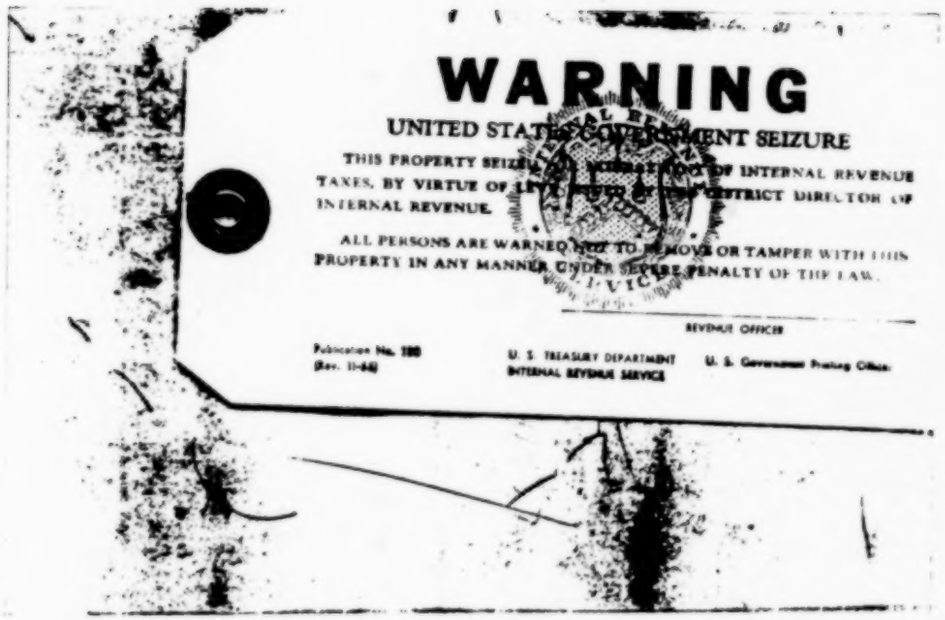
May 13, 1975

Date

State of California, County of San Francisco
On May 13, 1975, before me, Richard H. Buschman, a Notary Public, in and for said State, personally appeared ROBIN P. FIGHTMASTER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

Richard H. Buschman

BEST COPY AVAILABLE


WARNING
UNITED STATES GOVERNMENT SEIZURE
THIS PROPERTY SEIZED FOR NONPAYMENT OF INTERNAL REVENUE TAXES, BY VIRTUE OF LEVY ISSUED BY THE DISTRICT DIRECTOR OF INTERNAL REVENUE.
ALL PERSONS ARE WARNED NOT TO REMOVE OR TAMPER WITH THIS PROPERTY IN ANY MANNER UNDER SEVERE PENALTY OF THE LAW.
REVENUE OFFICER
Publication No. 180 (Rev. 11-68)
U. S. TREASURY DEPARTMENT INTERNAL REVENUE SERVICE
U. S. Government Printing Office

INTERNAL REVENUE SERVICE

# WARNING

## UNITED STATES GOVERNMENT SEIZURE

*This property has been seized for nonpayment of internal revenue taxes, by virtue of levy issued by the District Director of Internal Revenue. All persons are warned not to remove or tamper with this property, in any manner, under severe penalty of the law.*

Supreme Court, U. S.
FILED
AUG 4 1975
MICHAEL RODAK, JR., CLERK

Nos. 74-1450 and 74-6571

# In the Supreme Court of the United States

OCTOBER TERM, 1975

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FRANCIS STORY GOELTZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

KARL JACK BRAY and ROBERT GEORGE WRAY,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

ROBERT H. BORK,
*Solicitor General,*

RICHARD L. THORNBURGH,
*Assistant Attorney General,*

JEROME M. FEIT,
LAUREN S. KAHN,
*Attorneys,*
*Department of Justice,*
*Washington, D.C. 20530.*

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# In the Supreme Court of the United States

OCTOBER TERM, 1975

---

No. 74-1450

FRANCIS STORY GOELTZ, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

No. 74-6571

KARL JACK BRAY and ROBERT GEORGE WRAY,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

---

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## OPINION BELOW

The opinion of the court of appeals is reported at 513 F.2d 193 (Goeltz Pet. App. A1-A9; Bray Pet. App. A).

## JURISDICTION

The judgment of the court of appeals was entered on March 21, 1975. Mr. Justice White extended the time for filing the petitions for a writ of certiorari to May 20, 1975, and the petitions were filed on May 19, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether 18 U.S.C. 701 was properly applied to petitioners' conduct in this case, and, if so, whether it is unconstitutionally overbroad or vague.

2. Whether petitioners' request for a jury trial was properly rejected where the maximum sentence they could receive was a term of six months' imprisonment and a fine of $250.

3. Whether there was probable cause for petitioners' arrests.

4. Whether the trial judge properly refused to recuse himself.

5. Whether petitioner Goeltz was deprived of his Sixth Amendment right to a speedy trial.

6. Whether certain evidence concerning petitioners Bray and Wray was properly authenticated.



## STATUTE INVOLVED

18 U.S.C. 701 provides:

> Whoever manufactures, sells, or possesses any badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both.

## STATEMENT

After a non-jury trial in the United States District Court for the District of Utah, petitioners were convicted on one count of possessing a seizure notice of the United States Treasury Department and the Internal Revenue Service prescribed for the use of its officers and employees, or a colorable imitation thereof, in violation of 18 U.S.C. 701. Petitioners Goeltz and Bray were each sentenced to a term of six months' imprisonment and ordered to pay a $250 fine. Petitioner Wray was sentenced to a term of three years' probation and ordered to pay a $250 fine. The court of appeals affirmed (Goeltz Pet. App. A1-A9; 513 F.2d 193).

The evidence showed that on the evening of April 5, 1973, at a meeting held at petitioner Bray's office

and conducted by petitioner Goeltz for the purpose of opposing federal taxes, Bray informed those in attendance that on April 14, 1973, Internal Revenue Service seizure notices [1] would be placed on automobiles; that these would cause their owners to become angry and complain to the Internal Revenue Service (IRS); and that "good publicity" would result (Tr. 32-33, 52-53).[2]

On April 13, 1973, Dale Stephens, an IRS Special Agent working undercover, telephoned Goeltz to ask when the seizure notices would be distributed to the group. Goeltz told him that the seizure notices had not yet been printed, but they would be ready on April 16, 1973 (Tr. 34-35, 53-54).

[1] These notices are official documents which can be used lawfully only by revenue officers to collect taxes for the federal government when other means to collect the taxes have failed (Tr. 7). The IRS seal is affixed to the upper left hand corner of each seizure notice (Tr. 7-9).

The notices state (Goeltz Pet. App. C):

WARNING

UNITED STATES GOVERNMENT SEIZURE

> This property has been seized for nonpayment of internal revenue taxes, by virtue of levy issued by the District Director of Internal Revenue. All persons are warned not to remove or tamper with this property, in any manner, under severe penalty of the law.

A check of IRS records revealed that none of the petitioners was authorized either to possess or to use the notices (Tr. 8-10).

[2] "Tr." designates the transcript of the trial in the district court.



On April 19, 1973, Bray told Stephens that the seizure notices had been printed and that "we are going to do some midnight riding" (Tr. 36-37, 54-55). Goeltz, Bray, petitioner Wray, and Agent Stephens were present at the meeting that evening (Tr. 40, 55). Goeltz brought the seizure notices and requested that each person at the meeting take some of them and place them on vehicles during subsequent nights (Tr. 41). Goeltz warned that each person should be discreet about where he placed the notices and that the notices should be placed where IRS agents would normally place them; that, if they were apprehended while placing a notice on a vehicle, they should say that they were just replacing it, after it had fallen off the vehicle; that they should not have more than one seizure notice in their possession at one time; and that they should use cotton gloves while attaching the seizure notices to avoid leaving fingerprints (Tr. 41-42). When the meeting disbanded, petitioners picked up seizure notices and departed (Tr. 43-45).

Agent Stephens then notified other agents who were stationed outside the meeting that every person leaving the meeting was in possession of IRS seizure notices (Tr. 49). Petitioner Bray was thereupon apprehended and arrested as he walked from the meeting to his car, carrying several seizure notices (Tr. 133-138). Goeltz was apprehended and arrested when he reached his home; he was also found to be in possession of several IRS seizure notices (Tr. 116-117, 124-126). Wray was also apprehended and arrested at Goeltz's home, and a stack of IRS seizure

notices was found in the vehicle he drove from the meeting (Tr. 91-94).

## ARGUMENT

1. Petitioner Goeltz contends (Pet. 18-24) that his conduct did not come within the purview of 18 U.S.C. 701, since the seizure notices in his possession were not a "badge, identification card, or other insignia" of a government agency. The term "insignia," however, when considered in context and in view of the legislative purpose of the statute, is clearly meant to include such indicia of governmental authority as an IRS seizure notice. IRS seizure notices are intended to be used only by IRS agents and officials for the purpose of collecting taxes for the federal government (Tr. 7). The IRS seal is affixed to the upper left on each notice (Tr. 7-8). 18 U.S.C. 701 is plainly intended to prevent misrepresentation of government authority through the improper use of such indicia. See H. R. Rep. No. 1044, 72d Cong., 1st Sess. 1-2 (1932) (Goeltz Pet. App. B3-B4).

2. Petitioners contend (Goeltz Pet. 11-15; Bray Pet. 15-17) that 18 U.S.C. 701 is unconstitutionally overbroad and vague. We submit, however, that the statute's proscription against possession of "insignia * * * prescribed * * * for use by any officer or employee [of the United States] * * * except as authorized" comprehends conduct that is easily identifiable. The statute is a reasonably narrow prohibition directed against the evil sought to be avoided—misrepresentation of governmental authority.



This Court has repeatedly refused to strike down a statute as overbroad on its face where there were a substantial number of situations to which it could be validly applied. "Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the 'remainder of the statute * * * covers a whole range of easily identifiable and constitutionally proscribable * * * conduct * * *'" (*Parker* v. *Levy*, 417 U.S. 733, 760, quoting from *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 580-581). And as this Court recognized in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 615, "where conduct and not merely speech is involved" the overbreadth, to be fatal, must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." While there could be marginal applications of 18 U.S.C. 701 that are arguably contrary to the First Amendment—where, for example, the government insignia at issue are employed with the intention of conveying a political message rather than misleading the public—such potential overbreadth is insubstantial in relation to the unquestionably valid scope of the legislation.[3]

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[3] Petitioner Goeltz further contends (Pet. 11-14) that the statute as applied violated his First Amendment rights. As the court of appeals noted, however, petitioner's conduct was "of the dirty-trick variety and was for the purpose of enraging its victims and annoying IRS" rather than expressing ideas (Goeltz Pet. App. A6).

The phrase "possesses any * * * insignia * * * prescribed * * * for use by any officer or employee [of the United States] * * * except as authorized" is not impermissibly vague. It reaches a precise and readily ascertainable type of conduct and conveys a "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo*, 332 U.S. 1, 8. As the Court observed in *Boyce Motor Lines* v. *United States*, 342 U.S. 337, because of the necessary imprecision of language, only a "reasonable degree of certainty can be demanded" of any legislation (*id.* at 340). Moreover, "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise" (*United States* v. *Harriss*, 347 U.S. 612, 618). Here, the statute is clear in prohibiting what was done in this case—the unauthorized possession of governmental insignias for the purpose of misleading the public.

3. Petitioners contend (Goeltz Pet. 25-26; Bray Pet. 6-7) that the district court's denial of their motions for a jury trial violated their Sixth Amendment rights. The statute that petitioners were charged with violating defines a minor offense that carries a maximum penalty of six months' imprisonment and a $250 fine. It is well established that the Sixth Amendment guarantee of a jury trial does not apply to such offenses. *Frank* v. *United States*, 395



U.S. 147, 148; *Duncan* v. *Louisiana*, 391 U.S. 145, 162 n. 35.[4]

4. Petitioners contend (Goeltz Pet. 27-29; Bray Pet. 7-9) that they were unlawfully arrested because the misdemeanor with which they were charged was not committed in the presence of the agents who arrested them. Prior to arresting petitioners, however, the agents learned from Agent Stephens that each person who left the meeting was in possession of IRS seizure notices. Agent Stephens also knew of petitioners' purpose in possessing the notices and that petitioners were not authorized to have them. Imputing his knowledge to the other agents, *United States* v. *Sheppard*, 455 F.2d 1081, 1083 (C.A. 10), the arresting agents had probable cause to believe that petitioners, when apprehended soon after the meeting, were in unauthorized possession of the notices, in violation of 18 U.S.C. 701. Moreover, as the court of appeals noted (Goeltz Pet. App. A6-A7), since Agent Stephens was aware of petitioners' unauthorized receipt of the notices, he had probable cause to believe that petitioners had committed at least one of several felonies, including possessing a counterfeit seal (in violation of 18 U.S.C. 506), uttering false

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[4] Contrary to petitioners' contention, the fact that the court initially told petitioners that they were entitled to a jury trial but subsequently realized its mistake and denied their motions prior to trial did not vest them with any right to a jury trial. Petitioners cite no authority for the proposition that an erroneous ruling of this nature may not be corrected by the court prior to trial, and we know of none.

statements (in violation of 26 U.S.C. 7206) or interfering with administration of IRS regulations (in violation of 26 U.S.C 7212). And, since his knowledge could be imputed to the other agents, the agents had probable cause to make felony arrests. See *United States* v. *Comi*, 336 F.2d 856, 857-858 (C.A. 4), certiorari denied, 379 U.S. 992. The fact that prosecutorial discretion was exercised to charge only a misdemeanor could not retroactively invalidate the arrests.

5. Petitioners also contend (Goeltz Pet. 32-33; Bray Pet. 16-17) that the trial court judge should have recused himself from their case, since petitioners Bray and Goeltz previously had organized a group that sought to impeach the judge,[5] and that they did not receive a fair trial, since there was a "hostile atmosphere" in the court when their case was heard (Goeltz Pet. 32). As the court of appeals concluded after examining the entire record, however, there is

[5] Prior to trial, petitioner Bray moved, pursuant to 28 U.S.C. 144, for an order to have a different judge assigned to the case on the ground that Bray had organized a drive to impeach the judge, and the judge had dismissed a civil suit in which Bray was a plaintiff (R. 50). Neither petitioner Wray nor petitioner Goeltz joined in the motion, which was denied prior to trial. As the court of appeals noted (Goeltz Pet. App. A8), the motion did not meet the requirement, under 28 U.S.C. 144, that an affidavit alleging personal bias "shall state the facts and the reasons for the belief that bias or prejudice exists * * *." Instead, it stated conclusions and showed "at the most that Bray did not like Judge Ritter not that Judge Ritter was prejudiced against Bray. A decision [by the judge] against Bray in another case does not show prejudice."



no ground for finding the trial court judge was biased or prejudiced against petitioners (Goeltz Pet. App. A9). Petitioners' activities in trying to impeach the judge and their "impertinent and contemptuous behavior" (*ibid.*) during trial showed that they disliked the judge, rather than that the judge disliked them. "A party may not taunt a judge into a reprimand and then on appeal claim the reprimand was justification for a new trial" (*ibid.*).[6]

6. Petitioner Goeltz contends (Pet. 36-37) that he was deprived of his Sixth Amendment right to a speedy trial. Petitioners were arrested on April 19, 1973, the information was filed on April 20, 1973, and the trial occurred on March 13, 1974. Between May 29, 1973, and March 11, 1974, petitioners filed approximately 24 motions. The government never requested any delay. Goeltz did not file a motion to dismiss for want of speedy trial until March 4, 1974 (R. 66).[7] The record does not show that petitioners were prejudiced in any way from the delay, nor does Goeltz assert any such prejudice. As the court

[6] Petitioners do not point to any particular instances of "hostility" or prejudice. At several points in the trial, petitioner Bray accused the trial judge of being prejudiced against him (Tr. 108, 175). Petitioner Bray also desired to dispense with his court-appointed counsel in order to be represented by a person who was not a member of the bar. When the judge did not allow Bray to do so, Bray objected, and the judge stated that Bray was being impertinent (Tr. 64). These incidents do not establish that the trial judge was prejudiced against Bray.

[7] Bray and Wray filed similar motions on March 8, 1974, and March 11, 1974, respectively (R. 68, 72-73).

below held (Goeltz Pet. App. A7-A8), in these circumstances petitioner's right to a speedy trial was not denied. *Barker* v. *Wingo*, 407 U.S. 514, 530.[8]

7. Petitioners Bray and Wray contend (Bray Pet. 15-16) that the court denied them their Sixth Amendment right to confrontation when it admitted evidence without proper foundation. During trial, the government produced a document from the IRS data processing center in Detroit, Michigan, showing that petitioners had never been employed by the IRS (Tr. 11-13). Mr. Roland Wise, the IRS District Director for Utah, who was custodian of the document, testified that the document had been produced by the data processing center in the regular course of business after he had sent the center a teletype request for a computer search of IRS records to determine if any one of petitioners was an IRS employee (Tr. 5, 10-11). Petitioners objected to the introduction of the document because Wise had not personally overseen the computer search of the IRS records in Detroit. It is well established, however, that records made in

[8] Petitioner Goeltz additionally contends that he was prejudiced by the failure of the trial court to grant his July 23, 1973, motion for severance. (Goeltz Pet. 35). The decision to grant or to deny severance is, however, a matter within the court's discretion, Fed. R. Crim. P. 8(b), 14; see *United States* v. *Perez*, 489 F.2d 51, 64-65 (C.A. 5), certiorari denied, 417 U.S. 945. Here, the court did not abuse its discretion in denying severance. The facts and legal issues were the same with regard to each defendant, as was the evidence. Petitioner Goeltz does not allege how he was prejudiced by the court's denial of his motion to sever. See *Opper* v. *United States*, 348 U.S. 84, 94-95.



the regular course of business may be authenticated by the testimony of their custodian. See Rule 803 (6), Fed. R. Evid.

## CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

RICHARD L. THORNBURGH,
*Assistant Attorney General.*

JEROME M. FEIT,
LAUREN S. KAHN,
*Attorneys.*

AUGUST 1975.

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